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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHERRILL FOSTER, HOWARD FOSTER,
SHEILA BURTON, and MINNIE BURTON,

Plaintiffs,

v.

SHANNON EDMONDS, LORI TYLER, and
DOES 1-100,

Defendants.

) No. C-07-5445-WHA

)

) **OPPOSITION TO MOTIONS TO**
) **DISMISS**

)

) [Jury Trial Demanded]

)

) Date: September 25, 2008

) Time: 8:00 a.m.

) Honorable William H. Alsup

)

)

1 **I. INTRODUCTION**

2 On the early morning of December 7, 2005, Defendant Shannon Edmonds shot and killed
3 two young men, in the back, as they ran across the street from the house in which Edmonds
4 resided and which he co-owned with Defendant Lori Tyler in the City of Clearlake, County of
5 Lake. Those two, young men are Christian Foster and Rashad Williams, and they were hit
6 initially by Edmonds' fusillade far away from that house at 2922 11th Street in Clearlake.

7 Some believe Foster and Williams were at the 11th Street property to purchase marijuana,
8 one of the several recreational drugs Edmonds distributed or dealt from his home. Edmonds
9 himself has not been charged with a single crime in connection with the distribution of illegal
10 drugs and the murders of Foster and Williams. Instead, Renato Hughes was prosecuted by Lake
11 County for the murders of Foster and Williams; though Edmonds never saw Hughes the night in
12 question, Hughes was near the 11th Street house at the time Edmonds admittedly gunned down
13 Foster and Williams. Foster, Williams, and Hughes are black; Edmonds is white.

14 The criminal case against Hughes continues to receive scrutiny from the media. Lake
15 County prosecuted Hughes under the "provocative act" theory.¹ It bears repeating: Hughes faced
16 two felony murder charges; and, Lake County is not prosecuting Edmonds for any crime. Jon
17 Hopkins, Lake County District Attorney, emphatically refuses to file charges against Edmonds.

18 Because the murder case against Hughes delayed receipt of critical data, meaningful
19 information has been slow to come by in this civil case. However, the successors in interest to
20 Foster and Williams, the plaintiffs here, filed this action October 24, 2007.² They amended their
21

22 ¹ Elements of the 'provocative act' murder are found in *People v. Gilbert* (1965) 63 Cal.2d 690 [revd.
23 on other grounds (1967) 388 U.S. 263]: "When the defendant or his accomplice, with a conscious disregard for life,
24 intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response
to such act, the defendant is guilty of murder." Hughes was found *not* guilty of murder by the Contra Costa County jury.

25 ² Plaintiffs are the mother and father of Christian Foster, Sherrill Foster and Howard Foster; and, the
26 mother and grandmother of Rashad Williams, Sheila Burton and Minnie Burton. They sue here as successors in interest
and in their representative capacities. *See, e.g., Byrd v. Guess*, 137 F.3d 1126, 1131 (9th Cir. 1998).

1 complaint on December 7, 2007, with the filing of the first amended complaint (FAC).

2 Defendants Lake County and Clearlake moved to dismiss under Federal Rules of Civil
3 Procedure, Rule 12(b)(6). That motion was granted and the two remaining defendants, Edmonds
4 and Tyler, have now filed to dismiss in separate motions.

5 The motions should be denied. If the Court grants motions as to the federal claims,
6 Plaintiffs should be granted leave to amend; defects may be easily cured.

7 **II. DISCUSSION AND OPPOSITION**

8 Under FRCP, Rule 8(a), Plaintiffs' complaint must provide "fair notice of what the
9 claims are and the grounds upon which they rest. *See, Swierkiewicz v. Sorema NA*, (2002) 534
10 US 506, 514. A motion to dismiss under Rule 12(b)(6) focuses on the legal sufficiency of the
11 complaint. Dismissal is proper only where the facts alleged fail to state any claim upon which
12 relief may be granted. All well pled facts in the complaint must be taken as true and all
13 reasonable inferences that may be drawn from those facts must be in Plaintiffs' favor. *See, e.g.,*
14 *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 468-469 (8th Cir. 1976).

15 **A. The Evidence Adduced At Trial Gives Rise To New, Related Federal Claims.**

16 **(1) 42 USC §1981**

17 The jury trial against Renato Hughes ended on August 8, 2008 – less than one month ago.
18 During that trial, Shannon Edmonds testified *inter alia* that he would never sell drugs to black
19 people; of course, Edmonds used more inflammatory language in his testimony. But, the
20 evidence revealed at the trial was that Edmonds would sell his "medicinal" marijuana and other
21 wares to white people only. This is a violation of 42 USC §1981, which gives private persons
22 equal rights under the law as follows:

23 a) Statement of equal rights

24 All persons within the jurisdiction of the United States shall have the same right in every
25 State and Territory to make and enforce contracts, to sue, be parties, give evidence, and
26 to the full and equal benefit of all laws and proceedings for the security of persons and
property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other.

b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

[Emphasis added]

(2) 42 USC §1985(3)

Trial testimony brought to light new evidence of the fact that Edmonds, Tyler, and others discriminated against black people such as decedents when selling drugs. Additional evidence came to light that Edmonds, Tyler, and others conspired to violate the decedents’ civil rights the night Edmonds shot and killed Williams and Foster as they ran across the street, away from Edmonds’ home. Under 42 USC §1985(3), the new evidence gives rise to the following claim.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . , in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

B. The Original Federal Claims Should Not Be Dismissed.

Plaintiffs have previously sued under 42 USC section 1983, which allows individuals to bring suit against persons who, under color of state law, have caused them to be “depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. §1983. In order to state a claim under §1983, Plaintiffs must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law,

1 and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the
2 Constitution or laws of the United States. *See, e.g., Rendell-Baker v. Kohn*, (1982) 457 U.S. 830,
3 835, 102 S.Ct. 2764, 2768; *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912.

4 A private individual may be subject to liability under this section if he or she willfully
5 collaborated with an official state actor in the deprivation of the federal right. *Adickes v. S.H.*
6 *Kress & Co.*, (1970) 398 U.S. 144, 150-152, 90 S.Ct. 1598, 1604-1605. “Private persons, jointly
7 engaged with state officials in the prohibited action, are acting ‘under color’ of law for purposes
8 of the statute.” *Id.* [citation]. Conversely, a state actor may be subject to liability for an action
9 physically undertaken by private actors in violation of the plaintiffs’ liberty or property rights if
10 the state actor directed or aided and abetted the violation. *See, e.g., Fries v. Barnes*, 618 F.2d
11 988, 991 (2d Cir. 1980). A physical beating by one who has no privilege of inflicting such
12 corporeal punishment intrudes on the victim’s liberty interests. *See. E.g., Ingraham v. Wright*,
13 (1977) 430 U.S. 651, 672-74, 97 S.Ct. 1401, 1413-14.

14 Here, as seen in the FAC and demonstrated below, pursuant to official customs and
15 practices with Clearlake and Lake County, Edmonds’ illegal activities were allowed, promoted,
16 and protected by local law enforcement. The murders of Foster and Williams were caused by
17 these acts; the failures by local law enforcement to move against Edmonds sooner allowed him
18 to engage in continued activity and emboldened him to such an extent that the murders of Foster
19 and Williams were foreseeable and likely to occur.

20 The assistance given to Edmonds involves protection by members of the Clearlake Police
21 Department; and, by Lake County’s District Attorney and Sheriff Departments. While the
22 investigation still is in its infancy, the peeling away of layer upon layer has started to reveal
23 active participation by local law enforcement in Edmonds’ activities from the 11th Street
24 property, again *before* December 7, 2005.

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1 Then there is the destruction of evidence at the murder scene following the December 7,
2 2005, double homicide. Members of the Clearlake Police Department, Lake County Sheriff
3 Department, and Office of the District Attorney all allowed large amounts of illegal drugs to be
4 removed from the 11th Street house and either destroyed or hidden. A trailer on the property was
5 not searched and Defendants again allowed critical evidence to be secreted away.

6 Despite what has been portrayed as a massive and detailed search of Edmonds' home by
7 law enforcement following the two murders, weapons were never found. Then, many days
8 following December 7, 2005, Edmonds was allowed to return to his house and, within
9 *seconds* mysteriously was able to locate a tool allegedly used by Foster or Williams in the
10 ostensible attack on the night in question.

11 In one case, Erin Delew died when her bicycle was struck by a vehicle driven by Janet
12 Kathleen Wagner. The Las Vegas Metropolitan Police Department ("LVMPD") and Nevada
13 Highway Patrol ("NHP") ultimately found that Janet Kathleen Wagner was not the cause of Erin
14 Rae Delew's death. Delews' heirs were not convinced. They alleged that Wagner, whose
15 husband is an LVMPD officer, and certain other LVMPD and NHP officers, covered-up and
16 conspired to cover-up the true facts surrounding Erin Rae Delews death in violation of the
17 Delews' constitutional rights. The Ninth Circuit, in reversing the trial court, held as follows:

18 The Delews have indeed alleged a constitutional violation, namely, that the defendants
19 violated the Delews' right of meaningful access to the courts by covering up the true facts
20 surrounding Erin Rae Delew's death. The Supreme Court held long ago that the right of
21 access to the courts is a fundamental right protected by the Constitution. [Citation] More
22 recently, the Sixth Circuit held that the Constitution guarantees plaintiffs the right of
23 meaningful access to the courts, the denial of which is established where a party engages
24 in prefiling actions which effectively covers-up evidence and actually renders any state
25 court remedies ineffective. *See Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th
26 Cir. 1997), cert. denied, 118 S. Ct. 690 (1998). . . .

23 To prevail on their claim, the Delews must demonstrate that the defendants' cover-up
24 violated their right of access to the courts. . . . The district court additionally erred by
25 holding that the Delews' conspiracy cover-up claim failed to state a claim for relief. In
26 support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the
accident scene during the investigation and that the LVMPD and NHP officers permitted

1 Wagner to do so. Construing these facts in a light most favorable to the Delews, it is
2 reasonable to infer an understanding between Wagner and the officers to cover-up the
3 true facts of Erin Rae Delew's death and thereby deprive the Delews of their right of
4 access to the courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (. . . to
5 satisfy color of state law requirement under civil conspiracy theory, plaintiff need only
6 have shown that there was an understanding between civilian and officers to deprive
7 plaintiff of her rights). . . . *Delew v. Wagner*, 143 F.3d 1219, 1222-1223 (9th Cir. 1998).

8 Apprehension by the use of deadly force is a seizure subject to the reasonableness
9 requirement of the Fourth Amendment. *Tennessee v. Garner*, (1985) 471 U.S. 1, 7, 105 S.Ct.
10 1694. The nature and the quality of the individual's Fourth Amendment interests must be
11 balanced against countervailing governmental interests. *Id.* at 8, 105 S.Ct. at 1699; *United States*
12 *v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983). "[T]he 'reasonableness' inquiry in an
13 excessive force case is an objective one: the question is whether the officers' actions are
14 'objectively reasonable' in light of the facts and circumstances confronting them, without regard
15 to their underlying intent or motivation." *Graham v. Connor*, (1989) 490 U.S. 386, 396-397, 109
16 S.Ct. 1865, 1872; *see, also, Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102,
17 *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343.

18 This inquiry, of whether the suspect posed "a threat of serious physical harm either to the
19 officer" or to others is usually a question of fact for the jury. *Sloman v. Tadlock*, 21 F.3d 1462,
20 1468 (9th Cir. 1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992).

21 While the person who claims excessive force was directed at him or her can only raise a
22 fourth amendment claim, as can successors in interest, parents claiming loss of companionship
23 and society of his or her child raise a different constitutional claim. The Ninth Circuit recognizes
24 that a parent has a constitutionally protected liberty interest under the Fourteenth Amendment in
25 the companionship and society of his or her child. *See, Strandberg v. City of Helena*, 791 F.2d
26 744, 748 (9th Cir. 1986); *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985).

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C. Should The Court Dismiss, Leave To Amend Should Be Granted.

Plaintiffs should be permitted leave to amend if the Court (a) finds that Plaintiffs need additional facts to state claims upon which relief may be granted, and (b) grants the motions under Rule 12(b)(6). Federal Rules of Civil Procedure, Rule 15(a) is very liberal and leave to amend “shall be freely given when justice so requires.” *See, Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir.1999). “Dismissal without leave to amend is improper unless it is clear, . . ., that the complaint could not be saved by any amendment.” *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1258 (9th Cir. 2007). As illustrated above, Plaintiffs are able to state claims federal law; facts in support of their claims may be stated.

D. This Court Should Retain Jurisdiction If The Federal Claims Are Dismissed.

Plaintiffs invoked the jurisdiction of this Court under 28 USC §§ 1331 and 1343(a)(3), based upon claims arising under 42 USC §1983. In addition to these claims, Plaintiffs allege additional state law claims for negligence (count 3), battery (count 4), and for California Civil Code violations (count 5) and invoked the jurisdiction of this court over their additional claims based on supplemental jurisdiction pursuant to 28 U.S.C. §1367(a).

Should this court enter judgment on Plaintiffs’ federal claims, the Court has broad discretion to retain the remaining claims pursuant to 28 USC §1367(c)(3). *Foster v. Wilson*, 504 F.3d 1036 (9th Cir. 2007). Dismissal of plaintiffs’ state law claims following entry of judgment on the pleadings on the federal claims *will* result in substantial prejudice to Plaintiffs and *will* produce a significant waste of judicial resources and/or economy.

Initial disclosures have been made, the remaining counsel have met and conferred and await approval from counsel for Lori Tyler to file a joint discovery plan, a settlement conference is set to proceed on October 7, 2008, before Magistrate Judge Bernard Zimmerman, and trial of this case has also been set. The remaining parties agreed to certain discovery and to stay other discovery pending the outcome of the settlement conference. Plaintiff served written discovery.

1 **III. CONCLUSION**

2 A private actor killed two men, through the use of excessive force. That actor had been
3 supported, protected, and coddled by local law enforcement. The murders were motivated by
4 race. The two murders were the natural and foreseeable result of this cozy and unholy alliance.

5 The killer continues to receive protection from his friends and allies in law enforcement.

6 The motions should be denied. If granted, leave to amend should be given. Any defects
7 are easily cured.

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9 Date: September 4, 2008

/s/Russell A. Robinson

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